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IN THE

Supreme Court of the United States

OCTOBER TERM 1966.

No. 333

MAMIYE BROS., ET AL.,
Petitioners,

against

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

against

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

GELMART KNITTING MILLS, INC., ET AL.,
Petitioners,

against

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

against

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

ISAAC COHEN & SONS CORP., ET AL.,
Petitioners,

against

BARBER STEAMSHIP LINES, INC., ET AL.,
Respondents,

against

ATLANTIC STEVEDORING CO. INC., ET ANO.,
Respondents.

BRIEF OF RESPONDENT SHIPOWNERS A/S TANKFART I, A/S TANKFART IV, A/S TANKFART V, A/S TANKFART VI, DAMPSKIBSAKTIESELSKABET DEN NORSKE AFRIKA OG AUSTRALIELINIE, WILHEMSIENS DAMPSKIPSAKTIESELSKAB, A/S TONSBERG IN OPPOSITION TO PETITION FOR CERTIORARI.

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Opinions Below.

The opinion of the United States District Court for the Southern District of New York, the Honorable Inzer B. Wyatt, U. S. D. J., presiding, dismissing the libels is reported at 241 F. Supp. 99, and is set forth at pages 194a-232a of petitioners' appendix, Volume I of certified record.

The opinion of the United States Court of Appeals for the Second Circuit affirming the dismissal of the libels has not yet been officially reported. It is set forth at pages App. 1-15 of the appendix to the petition.

Jurisdiction.

Petitioners assert the jurisdiction of this Court under 28 U. S. C. 1254 (1).

Question Presented.

The sole question presented by this petition is whether this Court should undertake to review the finding and conclusion of the District Court, unanimously affirmed by the Court of Appeals, that the terminal operator was not negligent in the care and custody of the cargo on its pier, and that the damage was caused solely by Hurricane Donna, an Act of God.

Statement of the Case.

The statement of facts set out at pages 2-7 of the petition is argumentative and fails to include many of the most important facts as found by the District Court, and we respectfully refer this Court to the opinions of District Judge Wyatt and Circuit Judge Friendly.

We suggest the following as a summary of the relevant facts:

Donna was the only hurricane ever to proceed into the Gulf of Mexico west of Florida and thereafter affect New York Harbor (226a). Only five hurricanes (not seven as stated at page 3 of the petition) had affected New York since 1938 (229a).

By a remarkable coincidence, Donna hit New York Harbor exactly at the peak of the astronomical tide, resulting in the highest recorded water level in New York's history (220a).

Donna's recurvature began at 7:00 A. M. on Friday, September 9. At 5:00 P. M. on that day, Donna was about one hundred miles southeast of Key West, had changed her direction slightly from west to northwest and had slowed to about 9 miles per hour. The National Hurricane Center at Miami at that time predicted no material change in intensity, speed or direction during the next 12 hours (216a-217a).

On September 9, all indications were that Donna would proceed into the Gulf of Mexico and strike the Gulf Coast (217a).

However, since the recurvature was sharper than anticipated, Donna's track was to the east of that predicted and on Saturday, September 10, and Sunday, September 11, she crossed Florida and proceeded into the Atlantic. Even then, the official forecasts were that although Donna would reach the latitude of New York on Monday, September 12, she would be moving to the northeast off the eastern end of Long Island (219a-220a). It was not until 10:00 P. M., Sunday night that the first of these forecasts was issued, and not until 11:55 P. M. that the New York Weather Bureau warned that high tides might result. Even

on Monday morning the prediction was that in New York Harbor tides would be only about 3 to 4 feet above normal.

The floor of Pier 5 is 10 feet above mean low water, one foot above the requirement of the Department of Marine and Aviation of the City of New York. The previous high water levels for New York Harbor were reached during the severe northeast storms of 1950 and 1953, 9.2 and 9.6 feet, respectively, above mean low water. These would not indicate that the water level was above the floor of Pier 5, but it is assumed that some water went over the pier as a result of wave action (224a; 230a).

Under the rules of the Waterfront Commission, labor for Saturday and Sunday had to be ordered by 3:00 P. M. on Friday (223a).

At no time on Friday did the weather forecasts give any intimation that Donna posed a threat to New York. On Friday, labor was ordered for resumption of normal operations on Monday (217a; 225a).

On Monday, that labor was immediately put to work in an effort to protect as much of the cargo as possible before the hurricane struck (223a).

ARGUMENT.

There Is No Conflict of Decision.

The sole reason urged by petitioners for granting the writ is an alleged conflict between the decision of the Court below and that of the United States Court of Appeals for the Third Circuit in *World Products, Inc.* v. *Central Freight Service, Inc.*, 342 F. 2d 290.

To be sure, both cases involved Hurricane Donna, but it is obvious that the factual situations were different. Furthermore, both Courts applied identical standards in

determining the issue of negligence. There is thus no conflict of decision, nor even a conflict of principle.

Petitioners go to great lengths to deprecate the factual distinctions pointed out by Judge Wyatt (231a). The first of these is that the pier in *World Products* was only 7.6 to 8.6 feet above mean low water, as opposed to Pier 5, Bush Terminal, which was 10 feet above mean low water. The significance of this difference is that it is clear from the District Court's opinion in *World Products* that the New Jersey pier floor was below the *level* of the six highest waters prior to Donna, commencing with the hurricane of 1938. Pier 5, of course, was not.

It follows, as Judge Wyatt recognized, that the New Jersey pier must have been *under water* on at least six occasions, as opposed to being affected by random wave action, as Pier 5 had been only twice, and the pier owner was quite properly held to be charged with knowledge of the fact that his pier was too low. It is noteworthy that if Donna had struck only an hour or so before or after the astronomical high tide, no damage would have occurred on Pier 5. Not so at the lower pier in New Jersey.

In addition, it appears in *World Products* that no effort of any kind was made to protect the goods, even after the Sunday night predictions that Donna would affect New York Harbor. It is undisputed that the labor on Pier 5 was put immediately to work on Monday morning doing everything possible to protect the cargo. This, of course, was the earliest any such measures could be taken after the predictions of the Weather Bureau the night before.

Both Judge Augelli in *World Products* and Judge Wyatt in the District Court below recognized and applied the same standard: that the pier operator should be excused if he can prove that the exercise of reasonable care would not have

foreseen and prevented the water damage from Donna. In *World Products* the defendant was held liable because he knew or should have known that his pier was too low and did nothing to protect the goods even after actual notice of Donna's approach. In the case at bar Pier 5 was more than high enough to meet the requirements for New York piers, and the operator did what it could after notice. Accordingly, the Court below quite properly found no negligence.

The Decision Below Is Clearly Correct.

Petitioners argue at page 17 of their petition that "one circuit or the other must be wrong". But they seem to assume that only the Second Circuit is wrong, despite the thorough and detailed opinions of the Courts below.

Until 10 P. M. Sunday, September 11, there was no warning that Donna might reach New York Harbor. On Friday, September 9, the National Hurricane Center had no concern that in sixty hours Donna would be in New York. As Judge Wyatt asked:

> "If this was the belief of the weather experts themselves, how possibly could the management of Pier 5 be found unreasonable in acting at the same time on the same belief?" (227a).

The Court of Appeals, unanimously affirming, succinctly pointed out:

> "In appraising the operator's conduct, it is necessary to resist the strong human temptation to review action by looking backward 'with the wisdom born of the event' [citation omitted]. Though the unlikelihood of the risk must be factored upward by its gravity, see Prosser, Torts 150-51 (3d ed.

1964), nothing the operator knew or could have known on Friday should have led it to believe that the risk of the concatenation of adverse circumstances which actually occurred was sufficiently appreciable to call for emergency precautions entailing substantial expense" (App. 14).

In the final analysis, this is a simple case of negligence, of interest only to the parties. The firm conclusion reached after full consideration by the Court below, that it was not unreasonable to fail to take special action on Friday afternoon, should clearly not be disturbed.

Conclusion.

For the foregoing reasons it is respectfully submitted that this petition for a writ of certiorari should be denied.

Respectfully submitted,

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